73-1383

FILE COPY

Supreme Cou
F I L
MAR 13
MICHAEL ROBA

Supreme Court of the United States

October Term 1973

No. 73-1383

UNITED STATES OF AMERICA,

Respondent/Plaintiff,

vs.

KENNETH LEE GINGERICH,

Petitioner/Defendant.

UNITED STATES OF AMERICA,

Respondent/Plaintiff,

vs.

GREGORY MATTHEWS, T/N GREGORY HANDLER, aka,

Petitioner/Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICAHEL D. NASATIR, of
NASATIR, SHERMAN & HIRSCH
8383 Wilshire Blvd., Suite 510
Beverly Hills, California 90211
Telephone: (213) 653-3303
Counsel for Petitioners

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

TOPICAL INDEX

	Page
Petition of Kenneth Lee Gingerich and Gregory Matthews for a Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Questions Presented	4
Statutes and Constitutional Provisions Involved	4
Statement of Facts	5
Reasons for Granting the Writ	7
Argument	8
I There was insufficient evidence to justify the seizure of Petitioners and their vehicles in the Nevada dry lake beds	8
II The alleged observations of a federal agent through a window which was conceded not to exist and the alleged detection of an "odor of marijuana" are not sufficient to provide probable cause to justify the search of the vehicle	11
Conclusion	13

Appendix "A" - "C" attached.

TABLE OF AUTHORITIES CITI

Cases

Aguilar v. Texas, 378 U.S. 108,
84 S. Ct. 1509 (1964) .....

Henry v. United States, 361 U.S. 98,
80 S. Ct. 168 (1959) .....

Jones v. United States, 362 U.S. 257,
80 S. Ct. 725 (1960) .....

Pendegraft v. Superior Court,
15 Cal. App. 3d 237,
93 Cal. Rptr. 155 (1971) .....

People v. Grace, 32 Cal. App. 3d 447,
108 Cal. Rptr. 26 (1973) .....

Plazola v. United States, 291 F.2d 56
(9th Cir. 1961) .....

Sibron v. New York, 392 U.S. 40,
88 S. Ct. 1889 (1968) .....

Spinelli v. United States, 393 U.S. 410,
89 S. Ct. 584 (1969) .....

Terry v. Ohio, 392 U.S. 1,
88 S. Ct. 1868 (1968) .....

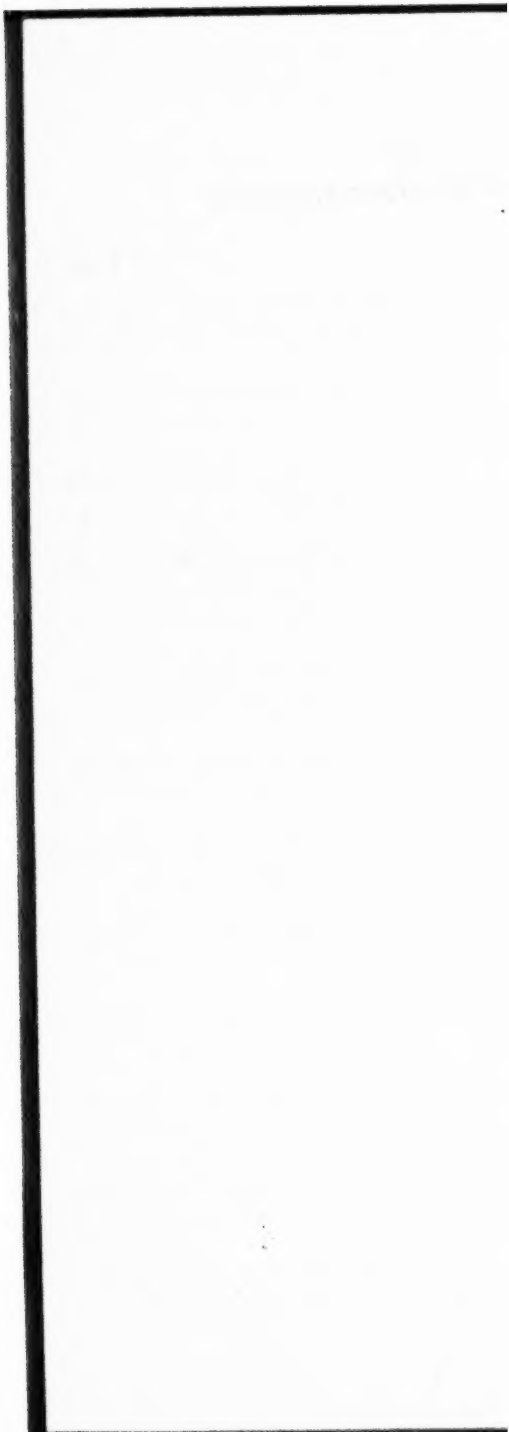
Whitely v. Warden, 401 U.S. 560,
91 S. Ct. 1031 (1971) .....

Willett v. Superior Court, 2 Cal. App. 3d 55
83 Cal. Rptr. 22 (1969) .....

Wong Sun v. United States, 371 U.S. 471,
83 S. Ct. 407 (1963) .....

TABLE OF AUTHORITIES CITED

Statutes	Page
United States Constitution Amendment IV	4,
18 U.S.C. § 2	
21 U.S.C. § 841(a)(1)	
28 U.S.C. § 1254(1)	



IN THE SUPREME COURT OF THE UNITE

October Term 1973

No. .....

UNITED STATES OF AMERICA,

Respondent/Plain

vs.

KENNETH LEE GINGERICH,

Petitioner/Defend

UNITED STATES OF AMERICA,

Respondent/Plain

vs.

GREGORY MATTHEWS, T/N GREGORY HANDLER,

Petitioner/Defend

PETITION FOR WRIT OF CERTIOR
TO THE UNITED STATES COURT OF A
FOR THE NINTH CIRCUIT

This is a Petition of KENNETH
and GREGORY MATTHEWS for a W
review the orders made by the Unite
Appeals for the Ninth Circuit on Jan
ing Petitioners' appeal, and on Febru
Petitioners' Petition for Rehearing; s
to review the order made by the Uni
Court, District of Nevada, convicting
of Title 21, United States Code, Sec
18, United States Code, Section 2.

OPINIONS BE

To Petitioners' knowledge, the
unofficial reports of (a) the order de
Motion to Suppress Evidence; (b) th
January 21, 1974, affirming the tria
Petitioners' Motion to Suppress and
convictions (a copy of said order ha
as Appendix "A"); or (c) the order
Court of Appeals for the Ninth Circ
denying Petitioners' Petition for Re
order has been attached hereto as A

JURISDICT

1. Petitioners filed a Motio
contraband in the United States Di
Nevada, and an evidentiary hearing
was heard on May 31, 1973.

2. The United States Distri

LEE GINGERICH
rit of Certiorari to
States Court of
ary 21, 1974 deny-
ry 11, 1974 denying
id appeal was sought
ed States District
Petitioners of violations
on 841(a)(1), and Title

OW

e are no official or
nying Petitioner's
e order entered on
judge's order denying
affirming Petitioners'
been attached hereto
iled by the United States
nit on February 11, 1974,
earing (a copy of said
ppendix "B").

ON

to Suppress the seized
trict Court, District of
pursuant to said motion

t Court, District of Nevada,

denied Petitioners' Motion to Suppress on Ma
On June 5, 1973, Petitioners withdrew their p
entered pleas of not guilty and entered pleas
tendere to Counts I and II of the indictment.
further specifically reserved their right to cha
order of the United States District Court, Dis
Nevada, denying Petitioners' Motion to Supp
and a timely Notice of Appeal was filed.

3. On January 21, 1974, Petitioners'
were affirmed by the Court of Appeals for th
Circuit, the Court of Appeals for the Ninth C
specifically finding probable cause to justify
and seizure of the contraband in the instant
dix p. 1).

4. On February 11, 1974, the Court
for the Ninth Circuit denied Petitioners' Peti
hearing (Appendix p. 2); on February 20, 19
for Petitioners, Michael D. Nasatir, of Nasati
Hirsch, received the order denying the Petitio
ing.

5. On February 25, 1974, counsel fo
caused to be mailed an Application For Stay
and an Application For Late Filing of Stay o
said application was made because counsel f
was not informed of the order denying the P
Rehearing until after the statutory seven-day
within which to apply for a Stay of Mandate

6. On March 8, 1974, Petitioners' att
Michael D. Nasatir, was informed by the Co
for the Ninth Circuit, via telephone, that the
the instant matter was stayed pending a time

Petitioners' Petition for Writ of Certiorari.

7. There have been no motions for extension of time within which to file this Petition for Writ of Certiorari.

8. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether Petitioners were denied their right to be free from unreasonable seizures when federal agents stopped the vehicles they were driving on a Nevada dry lake bed because said vehicles appeared to be similar to vehicles which had been observed next to an airplane on a dry lake bed, said airplane being similar to an airplane which had been the subject of a narcotics investigation, where individuals had been observed walking between the vehicles on the dry lake bed and the airplane carrying "something"?

2. Whether the alleged observation of large sacks located in a camper driven by Petitioner Gingerich and observed by a federal agent through a window that was subsequently admitted not to have existed, along with the alleged detection of an odor of marijuana, justified the warrantless search of said vehicle?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provision involved, the Fourth Amendment, is set forth in Appendix "C" hereto.

STATEMENT OF FACTS

Prior to February 12, 1973, an investigation and surveillance took place which led federal law enforcement officials to believe persons and vehicles located at a particular residence in Redondo Beach, California, were involved in or related with marijuana activity, and in particular had a nexus with an airplane in which marijuana debris had been found.

On February 12, 1973, federal agents began a constant surveillance at the Redondo Beach residence, viewing "a lot of activity" which was described as "people coming and going . . . [and] several pickup trucks with campers sitting there." The agents followed the petitioners from the residence, not knowing who they were, in trucks which were not registered to them, and the surveillance adduced no reason to believe the petitioners were acting in anything other than a law-abiding fashion. The two trucks were followed down the freeway to a department store, onto Interstate 15, heading toward Las Vegas, Nevada. While the trucks were fueling in Las Vegas, the federal agents cursorily looked in the trucks without entering the same, and in one truck a dog was seen and in the shell portion thereof were five five-gallon cans and in the other truck were two red objects and a green tarpaulin.

The agents then continued following the two trucks through Las Vegas toward an area called Alamo, Nevada, where about 2:30 a.m. they parked until 6:00 a.m., at which time the trucks proceeded down a dirt road.

When the trucks went across a dry lake bed, the federal agents got stuck and were unable to continue their surveil-

lance. The agents proceeded back to Alamo and requested air surveillance of the area. While checking out a landing area for the federal craft, the agents noticed a plane in the area "resembling" that which had been the subject of prior investigation, but they did not know whether it was in fact the "suspect" craft. The federal craft followed it to a dry lake bed where it landed. Two vehicles resembling those followed from California drove up to the side of the plane. The observers from the federal craft stated to the ground agent in charge, "One individual . . . walking to and from the vehicles to the plane, and it appeared . . . they were carrying something . . . . "

The trucks departed the area in separate directions and were subsequently stopped.

Petitioner Gingerich was stopped and patted down. At that time the federal agent looked in the camper window and " . . . observed some of the ends of the large sacks which were burlap protruding from underneath the canvas," and after standing there for a few seconds, " . . . smelled the characteristic odor of marijuana emitting from the truck"—which opinion was confirmed by another agent. The agents then took the key from the ignition, opened the rear of the camper, and "opened one of the bags . . . filled with loose . . . marijuana." *However, it was conceded by the Government at oral argument that there were no side windows in Mr. Gingerich's camper as alleged by the agent in his testimony on the motion to suppress evidence.*

After conducting the search of Petitioner Gingerich's truck, the agents instructed other agents to intercept the truck driven by Petitioner Matthews, since the advising

agent, having apprehended one truck with marijuana, was " . . . sure this one was loaded too." Petitioner Matthews was stopped, the agents went to the rear of the vehicle and detected an odor of marijuana. Looking in the windows, they saw large burlap bags in the camper shell. After taking the key, they opened the shell. The agents opened the bags, which were tied at the top, not knowing what was in them, and recognized marijuana.

REASONS FOR GRANTING THE WRIT

Petitioners contend that they were denied their rights secured to them by the Fourth Amendment to the United States Constitution when government agents stopped their vehicles in the middle of a Nevada dry lake bed and subsequently searched their vehicles. Petitioners feel that the decision of the United States District Court, District of Nevada, and the United States Court of Appeals for the Ninth Circuit effectively overrules this Honorable Court's decision in *Henry v. United States*, 361 U.S. 98, 80 S. Ct. 168 (1959). This Honorable Court should take this opportunity to reaffirm *Henry v. United States, supra*, and reverse the decision of the above-mentioned lower federal courts.

Petitioners also request that this Court seize upon this opportunity to give guidance to the Courts of Appeals on what standards to apply before the alleged detection of an odor of marijuana will constitute probable cause to justify a search. A clarification on this issue by this Court is of great importance because of the increased reliance of federal officers on an alleged "odor of marijuana" precedent

to a search of a vehicle.

ARGUMENT

I

There Was Insufficient Evidence To Justify The Seizure Of Petitioners And Their Vehicles In The Nevada Dry Lake Beds.

According to the testimony at the Motion to Su hearing, investigation and surveillance led law enforc officials to believe that persons in vehicles located at cular residence in Redondo Beach, California, were i with marijuana activity.[1]

The agents followed the vehicles when they left residence and proceeded onto Interstate 15, heading toward Las Vegas, Nevada. While the trucks were ob ing fuel in Las Vegas, the federal agents looked into trucks, without entering them, and observed in the s portion of one vehicle a dog and five five-gallon cans the other truck, two red objects and a green tarpauli observed. Of course, these observations are consiste a camping trip, prospecting trip or dune-buggy type sion to the desert. Being as consistent with innocen as with guilty conduct, these observations would no

[1]In order for this material to be considered as relevant matter for the detention of the campers in the desert, it had to be shown that the material was obtained from "reliable sources" and that there was an underlying basis to believe that the "facts" were as they were represe to be. *Spinnelli v. United States*, 393 U.S. 410,89 St. Ct. 584 (1969) *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 (1964). If all informa tion upon which the detaining and ultimately arresting agents relied was not presented first hand to the United States District Court Judg this information must be disregarded when cause for the detention is being considered. *Whitely v. Warden*, 401 U.S. 560, 91 S. Ct. 1031 (

Petitioners' detention. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). The agents continued following the trucks through Las Vegas to Alamo, Nevada, where at 2:30 a.m. they were parked until 6:00 a.m.[2]

As the trucks proceeded across the dry lake bed in the morning, the agents got stuck and were unable to proceed. While the agents were proceeding back to Alamo, they observed a plane "resembling" that which had been the subject of a prior investigation. Of course, a mere investigation in itself establishes nothing to justify a detention. *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889 (1968). It must also be remembered that the agents did not even know that this was in fact the aircraft which had been the subject of an investigation; it merely "resembled" said aircraft.[3] At this time a federal aircraft arrived on the scene and observed the suspect aircraft on the dry lake bed. Two vehicles "resembling" those followed from California drove to the side of the plane and the observer in the federal aircraft stated:

> "One individual . . . walking to and from the vehicles to the plane and it *appeared* . . . they were carrying something . . . . " (Emphasis added.)

This conduct was again as consistent with innocent activity as with guilty activity, as it is entirely possible that the

---

[2]Again, this stopping would seem to suggest that the occupants were merely tired and were obtaining some sleep before continuing their camping excursion.

[3]Petitioners would request that this Court take judicial notice of the fact that many makes of airplanes resemble each other. There was nothing to indicate that the agents were relying upon serial numbers to establish this "resemblance."

camping trip, prospecting trip or dune-buggy exc
was being supplied by friends with an aircraft. T
was absolutely no indication that there was cont
in the suspect airplane or that contraband was be
carried to the vehicles at this time. The lower fe
courts, in effect, overruled *Henry v. United Stat*
U.S. 98, 80 S. Ct. 168 (1959), when they upheld
detention of Petitioner Gingerich and the subseq
arrest of Petitioner Matthews. See *Plazola v. Un*
States, 291 F.2d 56 (9th Cir. 1961). Practically
Petitioner Gingerich was under arrest from the r
was detained.[4]

In *Henry v. United States, supra,* there was
whiskey from a Chicago terminal. While investi
theft, FBI agents obtained some information co
the accused and their involvement with intersta
The agents then followed the accused, saw the
accused were driving enter an alley and stop, ar
served the accused enter a residential premise a
a few minutes with some cartons. The agents s
lost sight of the car, but they then later observe
near a tavern. Shortly thereafter the agents sa
ed leave the tavern, enter the car, drive to the s
as before, enter the same gangway and return
cartons. As the car drove off this time, the fed
stopped the car. The Court, in reversing the c
stated:

---

[4]Petitioner was immediately patted down after his vehicle wa
no basis for the pat down was given, it should be assumed tha
Gingerich was not free to go at this time and, in effect, was u

> "Riding in the car, stopping in an alley, picking up packages, driving away—these were all acts that were outwardly innocent. Their movements in the car had no mark of fleeing men or men acting furtively. The case might be different if the packages had been taken fr a terminal or from an interstate trucking plat But they were not. As we have said, the alley where the packages were picked up was in a residential section. The fact that packages h been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure." (80 S. Ct. at 17

There was simply not enough evidence to indicate that Petitioners were violating any law at the time that thei vehicles were stopped.

II

The Alleged Observations Of A Federal Agent Through A Window Which Was Conceded Not To Exist And The Alleged Detection Of An "Odor Of Marijuana" Are Not Sufficient To Provide Probable Cause To Justify The Search Of The Vehicle.

After Petitioner Gingerich was stopped and patt the federal agents allegedly looked into the side wind the camper and observed the ends of burlap sacks pr from underneath a canvas. After standing in this loc a few moments, the agent allegedly detected the odo marijuana emitting from the camper. It is interestin

that at oral argument it was stipulated that there *side window on the camper of this vehicle.*[5] Thi cession on the part of the Government at oral ar in the Court of Appeals for the Ninth Circuit sh necessitated the remanding of the matter to the States District Court for the District of Nevada t trial judge to re-evaluate the credibility of the of testimony that he detected an "odor of marijua from the camper.

It is respectfully submitted that the stoppi tioner Gingerich was illegal. Further, the contin of Gingerich, so that the agents could snoop aro exterior of the camper and "sniff" for an odor, tutionally impermissible. *Terry v. Ohio, supra; New York, supra; People v. Grace,* 32 Cal. App. 108 Cal. Rptr. 26 (1973); *Pendegraft v. Superio* 15 Cal. App. 3d 237, 93 Cal. Rptr. 155 (1971); *v. Superior Court,* 2 Cal. App. 3d 555, 83 Cal.

After conducting the search of Petitioner vehicle, the agents instructed other agents to in vehicle driven by Petitioner Matthews, aka Han stopping Matthews vehicle, the agents went to the camper and detected an odor of marijuana. serving burlap bags in the back of the camper, obtained the key to the shell of the vehicle and Inside the vehicle they obtained marijuana. Th of Petitioner Matthews was illegal in that it wa

[5]Counsel for Petitioners is amazed at the increased carelessne ants in packaging marijuana so that it emits an odor and the i ability of federal agents to detect said odor, especially after t decisions of the federal courts allowing probable cause for arr search to be based solely upon the detection of an odor of ma

the fruits of the illegally seized evidence from the vehicle which Petitioner Gingerich was driving. *Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407 (1963). As both Petitioner Gingerich and Petitioner Matthews were charged with possession with intent to distribute all of the seized marijuana there is standing for both Petitioners to challenge both search *Jones v. United States,* 362 U.S. 257, 80 S. Ct. 725 (1960). The seized marijuana must therefore be suppressed from evidence.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submi that this Petition for Writ of Certiorari should be granted and that the issues herein presented be given pelnary consideratio by this Honorable Court.

Respectfully submitted,

MICHAEL D. NASATIR, of

NASATIR, SHERMAN & HIRS

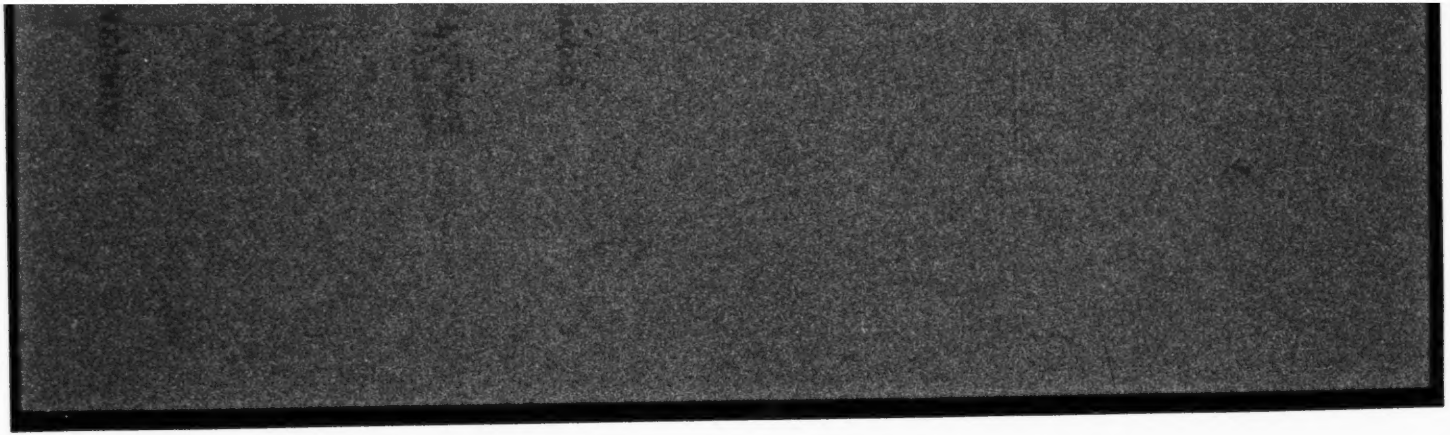
Counsel for Petitioners.

INDEX TO APPENDIX

"A"
Order entered January 21, 1974, affirming trial judge's Order denying Petitioners' Motion to Suppress Evidence

"B"
Order entered February 11, 1974 denying Petitioners' Petition for Rehearing

"C"
Constitutional provisions involved



APPENDIX "A"

MEMORANDUM

[Filed January 21, 1974]

(DO NOT PUBLISH)

In the United States Court of Appeals fo
Circuit.

No. 73-2667

UNITED STATES OF AMERICA, Plain
v. KENNETH LEE GINGERICH, Defendant-

No. 73-2668

UNITED STATES OF AMERICA, Plain
v. GREGORY MATTHEWS, T/N GREGOR
aka, Defendant-Appellant.

Appeal from the United States Di
For the District of Nevada

Before: KOELSCH and DUNIWAY, Circu
GRAY,* District Judge.

The judgments of conviction of both a
affirmed. We find ample probable cause for
less searches of the two vehicles.

---

*The Honorable William P. Gray, United States District Ju
District of California, sitting by designation.

APPENDIX "B"

ORDER DENYING PETITION FOR REHEARING

[Filed February 11, 1974]

In the United States Court of Appeals for the Ninth Circuit.

No. 73-2667

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. KENNETH LEE GINGERICH, Defendant-Appellant.

No. 73-2668

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. GREGORY MATTHEWS, T/N GREGORY HANDLER, aka, Defendant-Appellant.

Before: KOELSCH and DUNIWAY, Circuit Judges, and GRAY,* District Judge.

The members of the panel, having duly considered appellants' Petition for Rehearing, voted unanimously to deny the same.

IT IS SO ORDERED.

M. OLIVER KOELSCH
United States Circuit Judge

---

*The Honorable William P. Gray, United States District Judge for the District of Central California, sitting by designation.

CONSTITUTIONAL PROVISIONS INVOLVED

FOURTH AMENDMENT:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California over the age of eighteen years and not a party to the within action or proceedin that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on MARCH // , 1974, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (U. S. vs. Gingerich - 9th Circuit No. 73-2667 – U.S. vs. Matthews - 9th Circuit No. 73-2668) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follo

SOLICITOR GENERAL OF THE UNITED STATES
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530 [3 copies]

UNITED STATES ATTORNEY
FOR THE DISTRICT OF NEVADA
FEDERAL BUILDING
300 LAS VEGAS BOULEVARD SOUTH
LAS VEGAS, NEVADA 89101 [2 copies]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MARCH //, 1974, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 926
(714) 536-7161